BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2005-57-C - ORDER NO. 2006-692

NOVEMBER 21, 2006

IN RE: Joint Petition for Arbitration on Behalf of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC and Xspedius [Affiliates] of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended	)	ORDER GRANTING AND DENYING RECONSIDERATION IN PART

I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina (the Commission) on the Petition for Reconsideration filed by NuVox Communications, Inc. (NuVox) and Xspedius Communications, LLC, with its operating subsidiaries (Xspedius) (together, the Joint Petitioners), and the Motion for Reconsideration filed by BellSouth Telecommunications, Inc. (BellSouth) of Order No. 2006-531. As explained below, we grant in part and deny in part the Petition filed by the Joint Petitioners, and we grant the Motion filed by BellSouth.

II. RULINGS ON PETITION OF JOINT PETITIONERS

ISSUE NO. 4

Issue Statement: What should be the limitation on each party's liability in circumstances other than gross negligence or willful misconduct? (Agreement GT&C, Section 10.4.1)

The Joint Petitioners request reconsideration of the Commission's adoption of a limitation of BellSouth's liability to service credits. Instead, the Joint Petitioners again argue for a cap of 7.5% of amounts paid or payable as commercially reasonable. We reject the Joint Petitioners' argument, reaffirm our position as stated in Order No. 2006-531, and deny reconsideration on this issue.

First, the Joint Petitioners take issue with the fact that this Commission adopted a position that was consistent with precedent embodied in the decisions of the Federal Communications Commission's Wireline Competition Bureau, at least five other state commissions that have considered this same issue in companion arbitration dockets, and at least two state commissions that have considered this issue in other contexts. This point is somewhat puzzling, as is footnote one in the Joint Petitioners' Petition which (JP Petition) reminds this Commission that the "Mississippi Order" referred to in our Order was the result of an arbitration panel's decision. See JP Petition at 2. Footnote 24 of this Commission's Order at 6 clearly refers to the "Arbitration Panel of the Mississippi Public Service Commission."

Further, the JP Petition disagrees with our determination that commercial agreements are different from interconnection agreements. Our Order explained that distinction in detail at 7-9. In addition, the Tenth Circuit Court of Appeals has expressly held that "[a]n interconnection agreement is not an ordinary private contract," and [a]n interconnection agreement is not to be construed as a traditional contract, but as an instrument arising within the context of ongoing

federal and state regulation." e.spire Communications, Inc. v. New Mexico Public Regulation Commission, 392 F. 3d 1204, 1207 (10th Cir., 2004). Also, the Fourth Circuit has acknowledged that interconnection agreements are a "creation of federal law" and are "the vehicles chosen by Congress to implement the duties imposed in Section 251." Verizon Md., Inc. v. Global NAPS, Inc., 377 F. 3d 355, 364 (4th Cir. 2004). Clearly, our determination is fully supported by law.

Further, this same body of law dispenses with the Joint Petitioners' apparent suggestion that this Commission should disregard South Carolina state and federal court rulings supporting limitation of liability provisions because "the *Pilot* and *Parnell* decisions came many, many years prior to the 1996 Act establishing competition." JP Petition at 5. This Commission's decisions in this proceeding address wholesale services, wholesale elements, and wholesale relationships that are stringently regulated. Thus, as explained in our Order at 5-6, the rationale of the *Pilot* and *Parnell* decisions applies with equal force to this Commission's determination of Issue 4.

Also, the Joint Petitioners acknowledge that they can point to no other agreement that contains the limitation of liability provisions that they have asked the Commission to adopt, but they claim that they have pointed to similar provisions in other agreements. JP Petition at 4. These purportedly similar provisions provide for liability limitations in the range of $100,000 to $250,000 per event. JP Petition at 3. In sharp contrast, the language that the Joint Petitioners have asked the Commission to adopt would limit their liability to BellSouth to a mere $2,700 per event. This is compared to a "limitation" of BellSouth's liability to the Joint Petitioners of more than $8 million. Tr. at 400-401. These two sets of provisions cannot reasonably be described as "similar."

Reconsideration of this issue is denied.

ISSUE NO. 5

BellSouth Issue Statement: If the CLEC does not have in its contracts with end users and/or tariffs standard industry limitations of liability, who should bear the resulting risks? Joint Petitioners' Statement: To the extent that a Party does not or is unable to include specific limitation of liability terms in all of its tariffs and End User contracts (past, present and future) should it be obligated to indemnify the other Party for liabilities not limited? (GT&C, Section 10.4.2)

First, the Joint Petitioners' claim that "[t]he Commission's acceptance of BellSouth's argument that there is a specific industry standard for limitation of liability that applies to all carriers is in error." JP Petition at 8. This claim is somewhat confusing in light of their own witness's acknowledgment that limiting liability to the provision of bill credits is "probably the current practice" in the industry. Russell depo. at 82-83. *see also* FL Tr. at 182. Further, our finding is fully supported by the evidence of record cited at page 11 of Order No. 2006-531.

The Joint Petitioners also claim that the Commission's decision "severely limits the Joint Petitioners' ability to gain and maintain customers by offering more flexible and commercially reasonable liability terms," (JP Petition at 7-8) but this claim is not substantiated by any evidence in the record. In fact, the Joint Petitioners could not identify a single, specific instance where they had to concede limitation of liability language to attract a customer. See Joint Petitioners' Response to Interrogatory No. 22. The Joint Petitioners further speculate that BellSouth incorporates liability provisions into its contract arrangements with end users "that may vary from what BellSouth includes in its tariffs to win a customer in the competitive marketplace." JP Petition at 9. The Joint Petitioners, however, presented no evidence to suggest that this speculation is true. Clearly, if the Joint Petitioners make the business decision to not limit their

liability in their tariffs and contracts consistent with industry standards, then they should bear the risk associated with their business decision.

Further, the Joint Petitioners repeatedly ask the Commission to merely require the Joint Petitioners' limitations of liability provisions to be commercially reasonable. JP Petition at 8, 9, and 10. As noted above, however, an interconnection agreement is not a commercial contract. Additionally, granting the Joint Petitioners' request would gut the protections ultimately ordered by the Commission by relieving the Joint Petitioners of any obligation to BellSouth if the Joint Petitioners can argue that it is commercially reasonable for them to refuse to limit their liability to their end users within industry standards.

Finally, our ruling in this matter is consistent with decisions rendered by at least five other state Commissions that have considered this question in companion arbitration dockets and of at least two state Commissions that considered this issue in a different context. Order at 10. We reject the Joint Petitioners' arguments and deny reconsideration on this issue.

ISSUE NO. 6

BellSouth Issue Statement: How should indirect, incidental or consequential damages be defined for purposes of the Agreement? Joint Petitioners' Issue Statement: Should the Agreement expressly state that liability for claims or suits for damages incurred by CLEC's (or BellSouth's) customers/End Users resulting directly and in a reasonably foreseeable manner from BellSouth's or (CLEC's) performance of obligations set forth in the Agreement are not indirect, incidental or consequential damages? (GT&C Section 10.4.4)

This Commission has already found that the Joint Petitioners' proposed language "is unnecessary and defeats limitation of liability protections provided by language adopted by the Commission." Order at 12. The Joint Petitioners take issue with this finding, claiming that they are seeking "clearer definitions of 'indirect, incidental, and consequential' damages" because state law may not wholly define such damages..." JP Petition at 11. They then claim that their

proposed language "makes clear that all parties shall remain responsible for damages that are direct and foreseeable and that such responsibility should not be avoided on grounds that there has been an agreement to eliminate 'indirect, incidental, and consequential' damages." Id. The Joint Petitioners, therefore, appear to now claim that BellSouth should be responsible to the Joint Petitioners for indirect, incidental, or consequential damages to the extent such damages can be considered direct and foreseeable. We agree with BellSouth's position that that is anything but clear. See BellSouth Response at 6.

Given that the parties have not agreed to any definitions of "indirect, incidental, and consequential" damages, this Commission appropriately decided not to define those terms in the abstract in this interconnection agreement. Instead, if a dispute as to the meaning of those terms arises, it will be addressed in the context of a concrete set of facts and in the context of the law that exists at the time. This decision is also consistent with the decisions of the Florida and Kentucky Commissions. See FPSC Order No. PSC-05-0975-FOF-TP at 11 (October 11, 2005); Kentucky Commission, Order, Case No. 2004-00044 at 5 (September 26, 2005). We deny reconsideration of this issue.

ISSUE NO. 9

Issue Statement: Should a court of law be included in the venues available for initial dispute resolution for disputes relating to the interpretation or implementation of the Interconnection Agreement? (GT&C Section 13.1)

This Commission found in our previous Order that under the language the Joint Petitioners proposed, "a dispute about an interconnection agreement this Commission arbitrates and approves could be decided by a court in a state other than South Carolina." Order at 16. While some such disputes would fall within the Commission's jurisdiction and expertise, others

might not. Our original Order recognizes this fact and does not require the Joint Petitioners to present disputes that are outside the Commission's jurisdiction and expertise to this Commission. Instead, we specifically stated and concluded that "[d]isputes that address an interconnection agreement approved by this Commission, and that are within the jurisdiction and/or expertise of this Commission, should be presented to the Commission for resolution in the first instance." Order at 17-18. For all of the reasons set forth in the Order at 16-17, we believe that this was an appropriate and reasonable decision, and we reject reconsideration of this item, and reaffirm our original decision.

ISSUE NO. 12

Issue Statement: Should the Agreement explicitly state that all existing state and federal law, rules, regulations, and decisions apply unless otherwise specifically agreed to by the Parties? (GT&C, Section 32.2)

In requesting reconsideration of this issue, the Joint Petitioners ask this Commission to either adopt their language or, "[a]t a minimum...strike the final sentence of its proposed language." JP Petition at 18. The final sentence referred to is not "proposed language," but was instead language crafted by this Commission. This language reads as follows:

> Notwithstanding the foregoing, however, no Party may assert new rights or privileges not explicitly stated in this Agreement based on existing rules, regulations, rulings or other law that were not considered by the Parties at the time of the execution of this Agreement, unless consented to by the other Party to the Agreement. Order at 21.

Unfortunately, removal of this language leaves an interconnection agreement that is inconsistent with the prevailing law on the subject. Although the Georgia Commission agreed with the Joint Petitioners' position, that Commission's position was subsequently reversed by the U.S. District Court for the Northern District of Georgia.

The Georgia Commission had originally concluded that "Georgia law automatically incorporates into contracts all existing law, except when the contract specifies to the contrary." In BellSouth Telecommunications, Inc. v. Nuvox Communications, Inc., 2006 WL 2617123 (N.D. Ga., September 12, 2006) (the "Georgia Court Order"), the Court specifically rejected the Georgia Commission's conclusion, and held that both BellSouth and NuVox exercised their right under Section 251(a)(1) of the Telecommunications Act, and negotiated voluntarily their representative interconnection rights. Discrete sections of existing law were incorporated into specific provisions of the interconnection agreement when the parties so desired. The Court opined that such limited incorporations would have been unnecessary had BellSouth and NuVox intended a blanket incorporation of Section 251(c). The Court further found that the Georgia Commission's application of the law was arbitrary and capricious. Georgia Court Order at 13-14.

We hold that our inclusion of the "final sentence" was consistent with the Georgia Court Order. The Joint Petitioners are clearly incorrect in their expressed views on this issue, and we reject reconsideration.

ISSUE NO. 97

Issue Statement: When should payment of charges for service be due? (Attachment 7, Section 1.4)

The Joint Petitioners request reconsideration of our holding on this issue. We approved the following language for use in the parties' interconnection agreement:

> Payment for services should be due on or before the next bill date (Payment Due Date) in immediately available funds. However, BellSouth should submit bills for mailing such that, under normal circumstances, bill delivery may be expected at least fifteen days prior to Payment Due Date.

The Joint Petitioners claim that the allowed fifteen day period is not enough. JP Petition at 21. However, the evidence of record belies any claim that the Joint Petitioners need additional time to pay their bills. Specifically, NuVox, which claims to receive over 1,100 bills per month from BellSouth, has paid all of its bills in a timely manner for at least two years. See Joint Petitioners' Response to FL Staff's Interrogatory No. 71 and Russell Depo. at 231; FL Tr. at 264; GA Tr. at 513. This is controlling and it is unnecessary to consider any of the other arguments with regard to this matter. We deny reconsideration of this issue.

ISSUE NO. 100

Issue Statement: Should CLEC be required to pay past due amounts in addition to those specified in BellSouth's notice of suspension or termination for nonpayment in order to avoid suspension or termination? (Attachment 7, Section 1.7.2)

In Order No. 2006-531, this Commission held that this issue arises only when a Joint Petitioner does not pay *undisputed* amounts that are past due. Order at 25. We went on to hold that if a Joint Petitioner receives a notice of suspension or termination from BellSouth because the Joint Petitioner has not timely paid amounts that are not subject to a billing dispute, the Joint Petitioner should be required to pay all undisputed amounts that are past due as of the date of the pending suspension or termination action. This decision was consistent with at least two other state Commissions that have considered this same issue in companion arbitration dockets. Id.

The Joint Petitioners seek reconsideration of this portion of our decision, stating that BellSouth's notice will not state the full undisputed amount due on all accounts, but only the amount past due under one of hundreds of accounts. The Joint Petitioners point out that, with adoption of the BellSouth proposal, the burden is on the Joint Petitioners to determine what undisputed amounts are owed on the account at issue, as well as on hundreds of other accounts

that may become past due during the notice period. The Joint Petitioners argue that Order No. 2006-531 should be modified to adopt their position and language for this issue. The Joint Petitioners also propose an alternative, which would modify the ordered language so that it applies on an account-by-account basis. The Joint Petitioners point out that this modification would correct the problem of insufficient notice related to non-noticed accounts and can eliminate much of the complexity entailed when hundreds of accounts are involved. The Joint Petitioners also point out that BellSouth currently bills and gets paid on an account-by-account basis. JP Petition at 25-26.

Although we are mindful of BellSouth's response opposing any change in the adopted language, we agree with the Joint Petitioners that their alternative language, which would apply on an account-by-account basis, would correct the possible problem of insufficient notice related to non-noticed accounts, and would eliminate much of the complexity entailed when hundreds of accounts are involved. Accordingly, we grant reconsideration on this point and adopt the Joint Petitioners' modified language for the interconnection agreement as follows:

> If a CLEC receives a notice of suspension or termination from BellSouth as a result of CLEC's failure to pay timely, CLEC should be required to pay all undisputed amounts on the noticed account that are past due as of the date of the pending suspension or termination action.

ISSUE NO. 102

Issue Statement: Should the amount of the deposit BellSouth requires from CLEC be reduced by past due amounts owned by BellSouth to CLEC? (Attachment 7, Section 1.8.3.1)

In Order No. 2006-531 addressing this issue, we adopted the BellSouth proposal wherein BellSouth would reduce its deposit demand by the undisputed amount past due (if any) owed by BellSouth to any of the Joint Petitioners for payments pursuant to Attachment 3 of the

Interconnection Agreement. Under this plan, upon BellSouth's payment of such amount, a Joint Petitioner would be required to immediately increase the deposit in an amount equal to such payment(s). Order at 29. We found that, under this plan, the Joint Petitioners immediately receive the benefit of undisputed past-due amounts that BellSouth owes them, and they retain all remedies that are available to them with regard to disputed amounts. Id. The Joint Petitioners, however, disagree, and urge adoption of their original proposed language, with the caveat that offsets will pertain only to undisputed past due amounts. We discern no reason to reconsider our holding on this issue. Again, we think that the BellSouth language protects the Joint Petitioners, since they may reduce any deposit demands by BellSouth by any past due undisputed amounts owed by BellSouth. We deny reconsideration accordingly.

ISSUE NO. 103

Issue Statement: Should BellSouth be entitled to terminate service to CLEC pursuant to the process for termination due to non-payment if CLEC refuses to remit any deposit required by BellSouth within 30 calendar days? (Attachment 7, Section 1.8.6)

In Order No. 2006-531, we held that BellSouth has an undisputed right to a deposit. We also adopted BellSouth's language that allows BellSouth to terminate service if a Joint Petitioner fails to pay (or properly dispute) a deposit demand within 30 calendar days. This decision was stated to be consistent with decisions rendered by at least three other state Commissions that have considered this same issue in companion arbitration dockets. Order at 31.

The Joint Petitioners argue that we have rejected language that would protect both them and South Carolina customers form complete service shutdown if the Joint Petitioners fail to comply with BellSouth's deposit demands within 30 days. JP Petition at 27. However, as BellSouth points out, the parties have an agreed upon deposit dispute provision. See Attachment

7, Section 1.8.7. BellSouth Response at 16. The bottom line is that service is terminated only in the event a Joint Petitioner fails to pay or to properly dispute a deposit demand. Further termination of service may only occur upon observance of all of the Rules and Regulations of this Commission. See Attachment 7, Section 1.7.4. This request for reconsideration is also without merit and must be denied.

III. RULING ON MOTION OF BELLSOUTH

ISSUE NO. 101

Issue Statement: How many months of billing should be used to determine the maximum amount of the deposit? (Attachment 7, Section 1.8.3)

In Order No. 206-531, we held that BellSouth's financial risk is properly addressed by the maximum deposit provision already agreed to with ITC^DeltaCom. Therefore, we concluded that Section 1.8.3 of Attachment 7 should provide for a maximum deposit of up to one month's billing for service paid in advance, and up to two month's billing for services paid in arrears. We then adopted specific language for the interconnection agreement that set out these terms. Order at 28.

We also stated in that Order that we did not believe that BellSouth had demonstrated good cause to require different terms. Id. In its Motion, however, BellSouth points out that BellSouth's interconnection agreement with ITC^DeltaCom contains several significant financial criteria-related terms that are not contained in the interconnection agreement with the Joint Petitioners. Exhibit KKB-9 to BellSouth witness' Kathy Blake's rebuttal testimony (Hearing Exhibit 3) sets forth several payment and deposit provisions agreed to between BellSouth and ITC^DeltaCom. BellSouth Motion at 2-3. According to BellSouth, in exchange for DeltaCom agreeing to these financial criteria that reduce BellSouth's risk of non-payment, BellSouth

agreed to the lower maximum security deposit provision that appears in ITC^DeltaCom's interconnection agreement. BellSouth Motion at 3.

BellSouth points out that the Joint Petitioners are unwilling to accept any of the above-mentioned ITC^DeltaCom deposit provisions. Id., See also FL Tr. 1065; 1067-1068; GA Tr. at 545; Blake Rebuttal Testimony at 46-47. BellSouth argues that the absence of such terms from the Joint Petitioners' interconnection agreements, coupled with a lower deposit cap, increases BellSouth's financial risk. The Joint Petitioners argue that, because they negotiated other financial criteria with BellSouth, that BellSouth's financial risks are properly addressed. We agree with BellSouth.

Because the Joint Petitioners did not agree to the ITC^DeltaCom financial criteria, we do not believe that the Joint Petitioners are entitled to the ITC^ DeltaCom maximum deposit. We believe that giving the Joint Petitioners the ITC^DeltaCom maximum deposit without the ITC^DeltaCom financial criteria does increase BellSouth's financial risk, since the ITC^DeltaCom financial criteria appear to be more stringent than the criteria agreed to by the Joint Petitioners in the present case. For example, under one of the ITC^DeltaCom criteria, BellSouth has the right to terminate service "without regard to any other provision contained within this Agreement," if DeltaCom fails to cure a default of its deposit obligations set forth in subsection 1.11.9.2 within three (3) business days. BellSouth Motion at 3. The Joint Petitioners do not appear to have an equally severe financial criterion in the present interconnection agreement. In addition, the ITC^DeltaCom criteria require immediate payment of undisputed amounts and an obligation to pay charges for future services on an accelerated basis (within 15

days of bill/invoice). BellSouth Motion at 3. There does not appear to be a provision of equal severity in the Joint Petitioners' interconnection agreement. Joint Petitioners Comment at 3-5.

Although other examples could be cited, it is clear that the ITC^DeltaCom financial factors allow for a financial risk to BellSouth that is less than what is created with the provisions of the Joint Petitioners' interconnection agreement. Accordingly, in order to reduce the financial risk to BellSouth, we grant BellSouth's Motion for Reconsideration and adopt a higher cap for the security deposit. In this case, we adopt BellSouth's two-months' maximum security cap for the Joint Petitioners. That is, BellSouth may charge the average of two (2) months actual billing for existing customers or estimated billing for new customers. We believe that this helps to accomplish a lowering of BellSouth's financial risk, when it is combined with the other existing financial criteria in the interconnection agreement.

IV. CONCLUSION

As explained by the reasoning as stated above, we grant reconsideration on Issue 100 as requested by the Petition of the Joint Petitioners. We also grant reconsideration on Issue No. 101 as proposed by the Motion of BellSouth. We deny reconsideration of all other issues and, except

where otherwise stated herein, reaffirm our holdings in Order No. 2006-531. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

G. O'Neal Hamilton, Chairman

ATTEST:

C. Robert Moseley, Vice-Chairman

(SEAL)